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No. 84-2025

IN THE

Supreme Court of the United States

October Term, 1984

MONON SHIPPERS ASSOCIATION, INC., ET AL.,
Petitioners,

v.

Interstate Commerce Commission and
United States of America,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT SEABOARD SYSTEM RAILROAD, INC.

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July 26, 1985

BEST AVAILABLE COPY

QUESTION PRESENTED

Did the Court of Appeals properly apply the appropriate standards in reaching its decision to deny injunctive relief prohibiting cessation of operations on a line of railroad?

RULE 28.1 STATEMENT

Respondent Seaboard System Railroad, Inc. is a wholly owned subsidiary of CSX Corporation. Listed below are companies related to the Respondent and its parent:

Allegheny & Western Railway Company
Dayton and Michigan Railroad Company
Dayton and Union Railroad Company
Eastern Hardwood, Incorporated
Fruit Growers Express Company
Home Avenue Railroad Company
Littleton Fuel Company
Mid Allegheny Corporation
Monon Coal Company, Inc.
Nashville & Decatur Railroad Company
New Gauley Coal Corporation
North Charleston Terminal Company
Richmond, Fredericksburg & Potomac Railroad Company
Richmond-Washington Company
The Baltimore and Ohio Railroad Company
The Baltimore and Philadelphia RR Co.
The Cleveland Terminal & Valley RR Company

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BRIEF IN OPPOSITION OF RESPONDENT SEABOARD SYSTEM RAILROAD, INC.

Respondent Seaboard System Railroad, Inc. ("Seaboard"), Intervenor-Respondent below, respectfully requests that this Court deny the petition for a writ of certiorari in this case seeking review of four orders of the United States Court of Appeals for the Seventh Circuit.

COUNTER-STATEMENT

ICC Proceedings

This case concerns an ICC decision approving Seaboard's amended application seeking authority to abandon its 43-mile long line of railroad between Frankfort, Indiana and Indianapolis, Indiana.[1]

This abandonment authority became effective thirty days from the April 4, 1985 service date of the Commission's decision in Docket No. AB-55 (Sub-No. 94), *Seaboard System Railroad, Inc. - Abandonment - In Boone, Carroll, Clinton, Hamilton and Marion Counties, IN.* [Pet. App'x. 19a-39a]. On May 15, 1985, Seaboard exercised the abandonment authority to the extent of ceasing rail operations between Frankfort and Indianapolis but left the rail line in place.

Seaboard had initially requested abandonment authority for the longer 68.5-mile line from Delphi through Frankfort to Indianapolis, Indiana. Hearings concerning the proposed abandonment were held in Indianapolis, and on July 10, 1984, the Adminstrative Law Judge ("ALJ") issued his initial decision approving the 68.5-mile long abandonment. Three days later, Seaboard amended its abandonment application by withdrawing the 25.5-mile long segment between Delphi and Frankfort, Indiana. Seaboard withdrew the 25.5-mile long segment in response to a commitment by A. E. Staley Company to ship significantly increased volumes of traffic to and from its Frankfort facility. [Pet. App'x. 13a, 19a].

Certain Protestants in the ICC proceeding filed administrative appeals with respect to the ALJ's initial decision of July 10, 1984, relying in part on changed

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[1]The Commission's decision was by a four to three majority. Of the three minority votes, two Commissioners would have granted Protestants' request for a second reopening of the proceeding. The third dissenting Commissioner dissented on the merits but did not enter a dissenting opinion. [Pet. App'x. 39a]

circumstances occasioned by Seaboard's withdrawal of a portion of the abandonment. In its reply to those appeals, Seaboard submitted revised data relating specifically to the lesser included 43-mile line segment it still wished to abandon. [Pet. App'x. 14a-15a].

After considering Seaboard's withdrawal of a portion of the abandonment, Protestants' administrative appeals, and Seaboard's reply, the Commission, by decision served September 20, 1984, accepted Seaboard's revised data on the lesser included line segment and reopened the proceeding to consider that evidence and to receive further evidence from all parties through verified statements. Protestants were given until November 13, 1984, to file verified statements in reply to Seaboard's revised evidence on the Frankfort-Indianapolis line, and Seaboard was given until December 3, 1984, to file its verified statements in rebuttal.[2] [Pet. App'x. 13a-18a].

Within two weeks of their November 13, 1984, filing date in the reopened proceeding, Protestants served Seaboard with an extensive informal discovery request seeking workpapers and various information relating to workpapers. Seaboard responded to Protestants' discovery request immediately so that Protestants were able to utilize the discovered information in their replies and still make their deadline for filing. In its rebuttal statements, Seaboard submitted certain further revised data in response to points raised in the Protestants' reply statements. Protestants did not seek to discover the workpapers relating to those revisions but rather requested a further reopening to review the workpapers and/or conduct further cross examination. Seaboard opposed further reopening because it would cause further delay but

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[2]For some reason, the reproduction of the Commission's decision on page 18a of Petitioners' Appendix shows December 3, 1984, as the due date for both the Protestants' verified reply statements and Seaboard's verified statements in rebuttal. Seaboard's copy of the same order shows the specified filing dates as November 13, 1984 for Protestants and December 3, 1984, for Seaboard.

advised the Commission that it would submit the workpapers to Protestants if the Commission deemed such action desirable.

In the Commission's decision served April 4, 1985, authorizing the Frankfort-Indianapolis abandonment, the Commission denied Protestants' request for further hearing to examine the workpapers underlying Seaboard's rebuttal statement noting that railroads are not required to submit workpapers in abandonment proceedings and that such workpapers could have been obtained through a contemporaneous discovery request. [Pet. App'x. 21a].

As to the reopening occasioned by Protestants' administrative appeal of the ALJ's initial decision, the Commission placed the burden upon Protestants to come forward with evidence to show that the alleged changed circumstances - i.e., Seaboard's withdrawal of a 25.5 mile segment of the abandonment - called for a result different from the one reached by the ALJ. [Pet. App'x. 23a]. After considering the matter, the Commission concluded that reopening was appropriate and proceeded to consider the evidence submitted by both sides subsequent to the hearings. [Pet. App'x. 24a].

In its decision granting the Frankfort-Indianapolis abandonment, the Commission thoroughly considered Protestants' various objections to Seaboard's financial evidence. [Pet. App'x. 27a-34a]. The Commission concluded that:

> . . . [E]ven after adjustments most favorable to protestants, the financial exhibits show that the [Frankfort-Indianapolis] segment is losing money. [Pet. App'x. 29a].

Court Proceedings

1. Petitioners filed their petitions for review in the Court of Appeals on and after April 24, 1985. Seaboard intervened

in the court proceeding below as a matter of right by virtue of its participation in the involved ICC proceeding. Petitioners requested that the ICC stay its abandonment certificate pending judicial review and subsequently, on Friday afternoon, May 3, 1985, filed with the Court of Appeals their emergency application for stay and motion for interlocutory injunction. Said emergency application and motion bore the following notation on its cover sheet:

> Action is necessary on or before Friday, May 3, 1985, as the line abandonment certificate otherwise becomes effective at 12:01 A.M. Saturday, May 4, 1985.

Anticipating such a "last minute" filing by Petitioners, Seaboard, on May 3, 1985, filed with the Court of Appeals its "Reply to Anticipated Motions for Stay" and "Supplement to Reply to Anticipated Motions for Stay." On the evening of May 3, the Court of Appeals issued an order denying a stay. In its decision, the Court observed that:

> The moving papers here do not persuade us that the ICC is wrong, or even likely to be wrong. [Pet. App'x. 3a].

The Court also gave Petitioners the opportunity subsequently to seek injunctive relief if Seaboard decided physically to remove the involved railroad line, observed that the Petitioners had not cast serious doubt on the ICC's conclusion that the line was unprofitable, and noted that this Court had found that Congress wished to help relieve railroads from the burden of deficit producing services in a timely fashion. [Pet. App'x. 1a-4a].

2. On May 14, 1985, and on May 17, 1985, the Court of Appeals entered orders denying two supplemental motions for injunctive relief. [Pet. App'x. 5a-8a]

3. On June 3, 1985, the Court of Appeals denied the Petitioners' request for rehearing and suggestion for rehearing en banc. [Pet. App'x. 9a-12a]

Although railroad operations over Seaboard's Frankfort-Indianapolis line ceased effective May 15, 1985, the track is still in place so rail service could be resumed if the Court of Appeals ultimately reversed the ICC.

REASONS WHY THE WRIT SHOULD BE DENIED

I. There are no exceptional circumstances in this case which call for this Court's consideration of an interlocutory decision by a lower court.

Decisions on whether to grant injunctive relief are uniquely within the province and discretion of lower courts, and this Court has consistently refrained from overturning such interlocutory decisions absent exceptional circumstances. *Holtzman v. Schlesinger,* 414 U.S. 1304, 1308 (1973) (Marshall in Chambers), *Aberdeen & R. RR v SCRAP,* 409 U.S. 1207, 1218 (1972) (Burger in Chambers). As will be evident from the following two sections of this brief, there are clearly no exceptional circumstances in this case which call for this Court's consideration of the Court of Appeals' interloctory decision.

The Petitioners certainly cannot claim that they were not given ample opportunity to present their case to the Court of Appeals or that the Court denied their various petitions and motions in summary fashion. In response to Petitioners' veritable barrage of pleadings during the month of May, 1985, the Court of Appeals issued four separate orders denying Petitioners' requests for injunctive relief. [Pet. App'x. 1a-12a]. The Court's orders of May 3, 1985 and June 3, 1985, are substantive decisions which reflect thorough and appropriate consideration of Petitioners' various arguments. In view of the

lack of any exceptional circumstances, this Court should not endeavor to reconsider issues which have already been carefully and properly considered by the Court of Appeals.

II. The Court of Appeals properly applied the appropriate standards in determining whether or not to grant injunctive relief.

The only substantive issue before the Court is whether or not the Court of Appeals properly applied the appropriate standards in reaching its decision to deny Petitioners' request for injunctive relief. As Petitioners acknowledge on page 13 of their petition for certiorari, a request for injunctive relief must meet four prerequisites if it is to be granted. There must be a showing that:

1. There is reasonable likelihood of success on the merits;
2. Irreparable injury will result in the absence of an adequate remedy at law;
3. The threatened harm to the Petitioner outweighs the harm the injunction may cause the Respondent; and
4. The granting of the injunction will not disserve the public interest. *Ciechon v. City of Chicago,* 634 F.2d 1055, 1057 (7th Cir. 1980), *accord, Washington Metropolitan Area, etc. v. Holiday Tours,* 559 F.2d 841, 843-44 (D.C. Cir. 1977).

The circumstances of this case simply do not permit a finding that the above-listed prerequisites are present. First, as to likelihood of success on the merits, the Court of Appeals stated as follows in its order issued May 3:

> The moving papers here do not persuade us that the ICC is wrong, or even likely to be wrong. [Pet. App'x. 3a].

Petitioners contend that in enunciating the above-quoted finding, the Court of Appeals imposed an improper, "wrong" test to determine whether or not the requested injunctive relief should issue. The Court of Appeals' assailed pronouncement

is, however, clearly just another way of stating that Petitioners failed to show a reasonable likelihood of success on the merits. Petitioners' argument goes only to semantics, not substance. It is plain that the Court of Appeals considered the facts and found Petitioners unlikely to succeed.

In another argument relating to the Court of Appeals' consideration of "likelihood of success on the merits," Petitioners also assert that the Court of Appeals improperly established the "profitability" of the involved rail line as the controlling standard for review on the merits. [Pet. 11-13]. Petitioners assert that the Court of Appeals' alleged adoption of a "profitability" standard resulted from its mistaken interpretation of this Court's decision in *Hayfield Northern RR v. Chicago and N.W. Transp. Co.,* 467 U.S. , 104 S. Ct. 2610, 81 L. Ed. 2d 527 (1984).

Notwithstanding Petitioners' arguments to the contrary, the Court of Appeals did not interpret this Court's decision in *Hayfield* as establishing a "profitability" standard for railroad abandonment proceedings which would supplant the long-standing balancing test prescribed in *Colorado v. United States,* 271 U.S. 153, 168 (1926). The Court of Appeals merely, and correctly, recognized that in *Hayfield,* this Court found that Congress had taken various actions to "abbreviate the period during which a carrier is obligated to furnish financially-burdensome service it seeks to escape through abandonment." *Hayfield,* 467 U.S. at____, 81 L. Ed. 2d at 538. The Court of Appeals was thus correctly guided by this Court's recognition of congressional intent to enable railroads to abandon financially burdensome services without unreasonable delay. The Court of Appeals' reliance on *Hayfield* was entirely appropriate and in no way constituted application of a new or innapropriate standard to the merits of the abandonment decision.

As to the second standard, the Court of Appeals' order of May 3, 1985 correctly and adequately considers the issue of

irreparable injury. It recognizes that any irreparable injury would result from removal of the track rather than from mere cessation of service and affords Petitioners ample opportunity to seek appropriate injunctive relief if Seaboard decides to physically remove the involved line of railroad pending judicial review. Seaboard is required to give Petitioners 14 days notice of any plan to remove the track or otherwise make the line unsuitable for rail service, and at such time, Petitioners may petition the Court of Appeals for injunctive relief prohibiting any such destruction of the track. [Pet. Appx. 3a-4a]. Thus while Seaboard ceased operations over the involved line effective May 15, 1985, the track is still in place and rail service could be resumed if the Court ultimately reversed the ICC.

On page 14 of their petition, Petitioners provide authority for the proposition that state agencies can secure injunctive relief against an unlawful—i.e., without ICC authority—abandonment. Seaboard's Frankfort-Indianapolis abandonment is clearly not unlawful, however, and even a cursory review of the cited case shows that it dealt with a totally dissimilar factual situation. In said case, the Court was considering whether or not The Baltimore and Annapolis Railroad Company ("Baltimore & Annapolis") had impermissibly abandoned a line of railroad by suspending service for an extended period pursuant to an embargo.[3]

The embargo was imposed after the line had suffered extensive damage from a hurricane. Baltimore & Annapolis wished to abandon the line anyway, and it made no effort to make the repairs necessary to restore it to operating condition. The Court found that under such circumstances, the railroad had illegally abandoned the line without ICC approval, but those circumstances are clearly dissimilar with the facts of the

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[3]An embargo is a means of suspending service on a line of railroad in response to an emergency situation, but it is understood to be only a temporary measure. *ICC v. Baltimore and Annapolis RR*, 398 F. Supp. 454, 467 (D. Md. 1975).

case at hand. *ICC v. Baltimore and Annapolis RR,* 398 F. Supp. 454, 457-63 (D. Md. 1975).

The Court of Appeals was understandably unpersuaded by Petitioners' arguments that although the track might remain intact pending judicial review, the mere cessation of operations would cause irreparable injury. Petitioner Jack Black alleged that the subject abandonment would cause irreparable injury to railway employees, but unlike most workers whose jobs are eliminated or reduced, these railroad workers are protected by the standard employee protective conditions imposed by the Commission. [Pet. App'x. 37a.]. The labor interests were not satisified with this protection - United Transportation Union argued for *lifetime* labor protection for employees affected by this abandonment - but the Commission correctly found that there were no unusual circumstances to justify protective conditions more liberal than those normally imposed. [*Id.*]

Petitioner Monon Shippers Association, Inc. ("MSA") also alleged that shippers along Seaboard's Frankfort-Indianapolis line would be irreparably injured by its abandonment, but the Commission's findings showed that any adverse impacts on shippers would be minimal. As the Administrative Law Judge stated on page 13 of his initial decision served July 10, 1984:

> The evidence in this proceeding clearly indicates that there are alternative modes of transportation available to the shippers. Indeed, the evidence demonstrates that the shippers already make extensive and, in fact, in some cases exclusive use of the abundant alternate transportation available to them.

The Commission found that "The ALJ gave proper consideration to the shipper and community interests" and further found that the evidence submitted in the reopened proceeding by two of the shippers showed less use of the railroad in 1984 than they had predicted in their earlier statements. [Pet. App'x. 36a].

The ICC did not suggest that shippers would be unaffected by the abandonment but acknowledged that an unfortunate but unavoidable result of terminating uneconomical rail operations is that shippers will experience some financial difficulties. [*Id.*] This reasoning is entirely consistent with judicial decisions upholding ICC orders granting abandonment authority. Such decisions have held that:

> If railroad abandonment had to depend upon proof that the affected community would suffer no inconvenience or economic loss, we dare say that few lines, if any, would ever be abandoned. *Nebraska v. United States*, 255 F. Supp. 718, 722 (D. Neb. 1966).

It is thus clear that (i) the Court correctly concluded that mere cessation of operations over the involved line did not constitute irreparable harm and (ii) the Court effectively forestalled any possiblity of irreparable harm by providing an opportunity for subsequent injunctive relief in the event Seaboard contemplated physical removal of the track.

The third prerequisite for injunctive relief requires consideration of the harm the injunction might cause the respondent. In that regard, the Court noted in its May 3 order that:

> The papers filed with this court do not cast serious doubt on the basic conclusion of the ICC - that the line is unprofitable. [Pet. App'x. 2a].

It is thus evident that Seaboard would have suffered significant financial harm as the result of an injunction requiring continuation of the involved deficit operation.

The fourth and final prerequisite for injunctive relief is that it be required in the public interest. The Court of Appeals properly recognized that the public interest in rail abandonments transcends the interests of the protesting shippers and employees. It followed this Court's finding in *Hayfield* that Congress wished to help relieve railroads from

the burden of deficit producing services in a timely fashion.

Notwithstanding Petitioners' bare allegation that Mr. Justice Rehnquist's decision in *Coleman v. PACCAR, Inc.* is inapplicable to judicial review of administrative action under the Hobbs Act, it is clear that the findings in that decision apply equally well in these premises. It is likewise clear that the Court of Appeals applied the well established standards for issuance of injunctive relief in a manner consistent with Mr. Justice Rehnquist's findings in *Coleman. Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1305 (1976) (Rehnquist in Chambers).

III. The question presented for review does not raise any issues of substantial significance and deals with matters inextricably related to the facts of this case.

As was discussed in the preceding section, the question presented for review is extrememly narrow. It is not whether the Staggers Act changed standards governing line abandonments or whether the proper standard governing issuance of injunctive relief with respect to railroad abandonments is whether the underlying agency decision is "wrong." Rather, the only issue before this Court is whether or not the Court below properly applied the appropriate standards governing issuance of injunctive relief. A decision answering that question would not resolve any substantially significant matters and would be inextricably bound to the facts of this case. Moreover, the discussion in the preceding section clearly shows that the Court of Appeals properly applied the appropriate standards and that it would inevitably be upheld.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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